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82-736

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEARTLAND FOOD WAREHOUSE, A DIVISION OF PURITY SUPREME SUPERMARKETS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), if its hostility to certain employees' protected concerted activity is shown, by a preponderance of the evidence, to be a motivating factor in its decision to lay off those employees, and the employer cannot establish by a preponderance of the evidence that it would have taken the same action for legitimate reasons, absent the employees' concerted activities.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 685 F.2d 421. The decision and order of the National Labor Relations Board (App. C, *infra*, 11a-18a) and the decision of the administrative law judge (App. C, *infra*, 19a-34a) are reported at 256 N.L.R.B. 940.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 10a) was entered on June 1, 1982. On August 19, 1982, Justice Brennan extended the time in which to file a petition for a writ of certiorari to and including October 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been

suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause * * *.

STATEMENT

1. Respondent operates a number of retail grocery stores in New England, including stores at Newington and Vernon, Connecticut. When the Vernon store opened in October 1978, the union[1] picketed both stores for two days, informing the public that the stores were non-union (App. C, *infra*, 20a-21a). Respondent's Vice President for Industrial Relations, Brown, testified that at approximately the same time he told the Vernon employees that he "hoped [the store] would remain non-union" (Tr. 246, 244).

The following summer of 1979, meatcutters Barile and Carroll sought to initiate a union organizational drive (App. C, *infra*, 21a). On September 14, 1979, Barile also approached Store Manager Boyle and asked that a meeting be held between Boyle and the employees in the meat department to air grievances. Carroll made a similar request. Boyle agreed to a meeting, and promptly informed his supervisor, District Manager DeLuca (*id.* at 21a-22a). The meeting was held the next day, a Saturday; Barile and Carroll were the most vociferous in complaining about managerial conduct, including certain of Boyle's practices concerning overtime (*ibid.*).

After the meeting, Boyle reported to DeLuca what had occurred. The following Monday, September 17, DeLuca, in turn, reported the events to his supervisors, including Vice President Brown, noting that Boyle had violated company overtime policy and that this "was the kind of thing that * * * would probably

[1] United Food & Commercial Workers Union, Local 371, AFL-CIO.

end up in people asking other questions" (Tr. 498). DeLuca and Brown decided to go to Vernon and meet with the meat department employees, and they did so on October 4. At that meeting, Brown emphasized to the employees that they did not need a "third party" to speak for them. Although Brown did not use the word "union," it was clear—and Brown subsequently acknowledged—that he was referring to the union (App. C, *infra*, 13a, 22a-23a).

Meanwhile, on September 6, DeLuca had sent a memorandum to Vice President O'Brien stating that because of low sales volume, it might be necessary to eliminate two full-time meatcutters at both the Newington store and the Vernon store (App. C, *infra*, 24a). Later that month, DeLuca asked his subordinate supervisors to rank the five Vernon meatcutters in anticipation of possible layoffs. Although none of the meatcutters was considered deficient—and Boyle acknowledged that Barile and Carroll were "good" meatcutters—Barile and Carroll were ranked fourth and fifth (*id.* at 24a). At no time did DeLuca request rankings of the ten Newington cutters in comparison either to the Vernon cutters or to each other (*id.* at 24a, 26a).

On October 29, DeLuca reported in another memorandum to O'Brien that sales were up at both Newington and Vernon, and that it would be necessary to eliminate only 40 hours of cutter time at each store, rather than the 80 hours he had previously thought necessary. But instead of laying off one meatcutter from each store, DeLuca recommended that two Vernon cutters be laid off and one Newington cutter be transferred to Vernon. O'Brien agreed, and DeLuca ordered the layoffs of Barile and Carroll. DeLuca transferred Nasuti—a newly-certified meatcutter who was less experienced than either Barile or Carroll, and who had failed the certification test earlier that year before passing it on his second attempt—from Newington to

Vernon (App. C, *infra*, 14a, 24a-25a). While part-time employees had previously been laid off at Vernon, no full-time employees had ever before been laid off; instead, respondent's policy was to give full-time employees an opportunity to transfer to other departments or to Newington (*id.* at 26a-27a). Barile and Carroll were not given such an opportunity (*id.* at 27a).

2. The Board, accepting the finding of the administrative law judge, concluded that respondent had selected Barile and Carroll for layoff "because of their participation in * * * concerted activities" protected by Section 7 of the National Labor Relations Act, 29 U.S.C. 157 (App. C, *infra*, 12a), and therefore had violated Sections 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3), and (1). The Board ordered that Barile and Carroll be reinstated with back pay (App. C, *infra*, 15a-16a).

In reaching this conclusion, the Board explicitly relied (App. C, *infra*, at 12a) on its decision in *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). There the Board explained that, in determining whether an employer's action violated Section 8(a)(3), it would first require the General Counsel to show that the employee's protected activities were a "motivating factor" in the employer's decision to take adverse action against the employee. If the General Counsel made this showing, the Board ruled—explicitly following this Court's decision in *Mt. Healthy City School District Board of Educaton* v. *Doyle*, 429 U.S. 274 (1977)—that the employer could avoid an unfair labor practice finding only if it proved, by a preponderance of the evidence, that the adverse action would have been taken even if the employee had not engaged in protected activities. 251 N.L.R.B. at 1089.

Here, the Board, after reviewing the evidence, found that respondent's "knowledge of the protected activities

of Carroll and Barile as leaders in the presentation of employee grievances, and its fear that their activities might culminate in a union drive, were factors in their selection for discharge" (App. C, *infra*, 13a), and that the General Counsel had therefore met his burden under the Board's *Wright Line* test. The Board then turned to respondent's proffered reasons for discharging Barile and Carroll and concluded that those reasons were "incompatible with [respondent's] actions both prior to and following their termination" (App. C, *infra*, 14a). The Board noted, in particular, respondent's decision to transfer a less experienced and less able meatcutter from Newington to Vernon to replace Carroll and Barile, and its deviation from its policy of allowing full-time employees to transfer instead of being laid off (*id.* at 14a-15a). The Board also pointed out that although respondent "contends that it had economic problems in both its Vernon and Newington stores it made no attempt to rate the meatcutters in Newington," where, in contrast to Vernon, there was no "employee unrest" (*id.* at 14a).

3. The court of appeals, which had previously stated that it disagreed with the Board's *Wright Line* test, refused to enforce the Board's order. The court noted that it had previousy ruled that even after the General Counsel proved that an improper purpose was a motivating factor, "the employer must only carry a burden of *production*" (App. A, *infra*, 3a; emphasis in original). The court therefore concluded that "the Board applied an incorrect legal standard to the facts" of this case (*ibid.*) and explained that "it has been our practice to remand cases decided under the Board's improper standard whenever it appears to us that the case was close enough that 'burdens of proof' may have affected the conclusion of the case" (*id.* at 4a). After examining the evidence, the court concluded that if the Board had applied the standard prescribed by the court, it might

have reached a different conclusion, although it was not required to do so (*id.* at 8a). The court accordingly vacated the Board's decision and remanded the case for further proceedings (App. B, *infra*, 10a).

REASONS FOR GRANTING THE PETITION

In *NLRB* v. *Transportation Management Corp.*, petition for cert. pending, No. 82-168 (filed July 30, 1982), we have sought review of another First Circuit decision rejecting the burden-shifting aspect of the Board's *Wright Line* test.[2] We urge that the First Circuit's decisions conflict with the decisions of several other courts of appeals, and that the Board's *Wright Line* test is fully consistent with the National Labor Relations Act.

Here, the court of appeals expressly reaffirmed its disapproval of the Board's *Wright Line* test (App. A, *infra*, 3a)[3] in concluding that only the burden of production, not the burden of persuasion, could shift to respondent. Moreover, the court specifically concluded that the allocation of the burdens of proof was material to this case. This case therefore presents the same issue that we raise in our petition in *Transportation Management*.

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[2] A copy of our petition in *Transportation Management* has been sent to respondent.

[3] The First Circuit initially expressed its disapproval of the Board's *Wright Line* test in the proceedings to review the *Wright Line* order. 662 F.2d at 904-907. (Because the First Circuit believed that the shifting of the burden of proof was not material to the outcome of *Wright Line* itself, it enforced the Board's order in that case (*id.* at 907-909)). In both this case (see App. A, *infra*, 3a-4a) and *Transportation Management* (see 82-168 Pet. App. 3a), the First Circuit relied on its discussion in the *Wright Line* case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the disposition of *NLRB* v. *Transportation Management Corp.*, No. 82-168.

Respectfully submitted.

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OCTOBER 1982

APPENDIX A

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1592

HEARTLAND FOOD WAREHOUSE,
A DIVISION OF PURITY SUPREME SUPERMARKETS,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
Aldrich and Breyer, *Circuit Judges*,
and Torruella,* *District Judge*.

June 1, 1982

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*Of the District of Puerto Rico, sitting by designation.

BREYER, *Circuit Judge.* This case asks us to determine whether the National Labor Relations Board's finding that petitioner, Heartland Food Warehouse, Division of Purity Supreme Markets ("the Company"), discharged two employees, John Barile and Kerry Carroll, in violation of the National Labor Relations Act is supported by "substantial evidence." The Board found that the Company dismissed these two meatcutters because they engaged in "concerted activities for the purpose of mutual aid and protection"—a right guaranteed by § 7 of the Act—and in order to nip union organizing activities in the bud, thus violating both NLRA §§ 8(a)(3)[1] and 8(a)(1).[2] Our job on review is to decide whether there is "substantial evidence" in the record viewed "as a whole" to support this conclusion. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1976). Or, to use another verbal formulation, we must uphold the Board's finding if it is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal*

[1] Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 29 U.S.C. § 158(a)(3) (1976).

[2] Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ." 29 U.S.C. § 158(a)(1) (1976). Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectiveiy through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Id. § 157.

Camera Corp. v. *NLRB*, 340 U.S. 474, 477 (1951); *NLRB* v. *Concord Furniture Industries, Inc.*, No. 81-1462, slip op. at 3 (1st Cir. March 26, 1982); *NLRB* v. *J.K. Electronics*, 592 F.2d 5, 7 (1st Cir. 1979). Although "we must take contradictory evidence in the record into account," ... 'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' " *NLRB* v. *Concord Furniture Industries, Inc.*, slip op. at 3, *quoting Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

In this case, however, as in several other cases decided before this court's opinion in *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), the Board applied an incorrect legal standard to the facts. In *Wright Line*, we held that the Board was incorrect in ruling that once the general counsel has made " 'a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected conduct was a "motivating factor" in the employer's [discharge] decision ..., the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.' " *Id.* at 901-02, *quoting Wright Line, A Division of Wright Line*, 251 N.L.R.B. 1083, 1089 (1980). Under the proper standard, we explained, the employer must only carry a burden of *production*; the burden of proving all issues of disputed fact by a preponderance of the evidence remains with the general counsel. *NLRB* v. *Wright Line*, 662 F.2d at 904-05. It was and is our opinion that "[t]his approach will assure that due consideration is given to all facets of the case." *Id.* at 907. In other words, we sought to ensure that the Board "must itself make a judgment about whether the evidence *overall* does or does not support a finding of violation; it cannot avoid this issue by retreating to the language of 'burdens of proof.' "

NLRB v. *Transportation Management Corp.*, No. 81-1537, slip op. at 5 (1st Cir. April 1, 1982) (Breyer, J., concurring) (emphasis added).

Since deciding *Wright Line* it has been our practice to remand cases decided under the Board's improper standard whenever it appears to us that the case was close enough that "burdens of proof" may have affected the conclusion of the case. Despite the Board's labelling of the Company's asserted justification as a "make-weight" argument here, we believe that this case is appropriately remanded to the Board for reconsideration. The Board clearly set out its own *Wright Line* test as its framework for analysis, and in arguing this case, the general counsel specifically asked this court to repudiate its own *Wright Line* decision in favor of the Board's initial version of that test. As these facts suggest, the evidence here makes the evidence close enough to prevent us from clearly identifying how the Board would have decided the case had it applied the correct *Wright Line* standard.

This case is unusual in that the Board sought to support its conclusion from the very evidence the Company offered to justify its dismissals. In a nutshell, the Company owned two retail food stores in Connecticut: the Vernon store, where Barile and Carroll worked, and the Newington store, which was about 15 miles away. Both stores were relatively new, Newington having opened in 1977 and Vernon in 1979, and neither store met projected sales in its early years of operation. The situation was particularly critical at Vernon, where in the spring and summer of 1979 poor sales forced the Company to lay off some part-time meatcutters and transfer others. These steps did not solve the problem of overstaffing, and in early September 1979, District Manager Ned DeLuca, who oversaw both Vernon and Newington, wrote to his supervisor, Walter O'Brien, that it might be necessary to lay off two full-time

meatcutters at each store. In late October, DeLuca wrote another memo to O'Brien, saying that business had picked up slightly at both stores so that only one meatcutter need be laid off at each store. DeLuca also explained in his memo that it was his intention to transfer one cutter from Newington to Vernon and then lay off *two* meatcutters at Vernon. In the following weeks, DeLuca implemented this plan, asking four persons to rank the five meatcutters at Vernon (not including the meatcutter transferred from Newington) and then terminating the two lowest-ranking cutters. These two cutters were Barile and Carroll.

The Company explained this rather round-about means of selection for discharge as follows. The cutter transferred from Newington to Vernon, Carlo Nasuti, was a long-time friend of Ned DeLuca, having transferred from one of DeLuca's Massachusetts stores to Newington to help start operations at that store. In the summer of 1979, DeLuca learned that Nasuti was planning to marry another Newington employee. Because Heartland had a policy prohibiting married employees from working together, Nasuti or his bride would have to be transferred or fired. DeLuca's answer to what he perceived as a dual problem (reducing the hours at both stores and at the same time retaining his friend Nasuti) was to transfer Nasuti to Vernon and then solve the compounded overstaffing problem at Vernon by laying off two meatcutters there.

The Administrative Law Judge who tried the case and the Board found this procedure to be highly suspicious. Specifically, they could not understand why, given the need to remove one cutter from each store, the Company had not made any effort to rank Newington meatcutters or even to rank Nasuti, comparing him with the other meatcutters at Vernon. They felt that this failure, particularly given Nasuti's relative inexperience as a meatcutter, indicated that the Company had

made a conscious attempt to "cover its tracks" and create a record disguising its true criteria for selection at Vernon. The Board and the ALJ also believed that the Company's failure to offer Carroll and Barile transfers to other stores was a disparity in treatment between these two employees and others who were discharged. Following *Shattuck Denn Mining Corp. (Iron King Branch)* v. *NLRB*, 362 F.2d 466 (9th Cir. 1966), the Board and the ALJ inferred the existence of an illegitimate motive for discharge, *i.e.*, antiunion animus, from the existence of a motive which is asserted, but shown to be false.

This inference formed the most substantial portion of the general counsel's *prima facie* case. The Board bolstered this case by pointing to the following additional facts: (1) Boyle and Carroll were participants in a meeting held by the store manager, Warren Boyle, with the Vernon meatcutters to air various grievances. Further, they encouraged the holding of the meeting and were two of the major complainers at the meeting. (2) The Company tried very hard to prevent its stores from being unionized. At an early orientation meeting Brown told Vernon's employees that he hoped they would remain non-union; when Vernon opened, members of the meatcutters union picketed the store; and the meatcutters union was particularly active in seeking to organize the Company's store. (3) Consequently, the Company took the Boyle meeting very seriously, and followed the meeting by sending the vice-president for industrial relations, Leo Brown, and DeLuca to the store for a series of meetings with the employees. During Brown's discussion of benefits with the meatcutters, he mentioned the store's "open door" policy, adding that "there was no need for anyone to have a third party speaking for them." Thus the Board found that, even if the Company did not know in fact that Barile and Carroll were engaged in union organizing,

the Company at least knew that Barile and Carroll were likely organizers of potential union activity; and it selected them for discharge to alleviate that danger.[3]

We doubt that the Board could reasonably find illegal discharges on the basis of these last three sets of circumstances alone. Without considering inferences which flow from the existence of a fabricated rationale for selection for discharge, what remains is only a picture of a Company, anxious to deal with employee complaints, dismissing two employees who made mostly minor complaints at a general meeting which one (or both) may have helped to promote. Thus, the key finding in

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[3] The ALJ's opinion differed from the Board's on this point. Both Barile and Carroll testified that they had attempted to generate interest in unionization among the meatcutters in August or September of 1979. This attempt consisted of some conversations at the Heartland store and two poorly attended meetings held off the Company premises. Such union activity as there was was short-lived, and Boyle, DeLuca, and Brown all denied knowledge of this activity prior to the filing of charges in this suit. In his opinion the ALJ noted these denials, but stated that,

> Dussault, the meat department head, must necessarily have been aware of [the activity]. Though he testified he did not confirm or deny such knowledge. Given the nature of the operation and the small number of employees, I conclude that Dussault had specific knowledge of the union activity. Even though it appears from the record that his duties do not make him a supervisor within the meaning of Section 2(11) of the Act, he is sufficiently identified with management of the Respondent's Vernon store so as to conclude that his knowledge became at least the supposition of higher management. This was not denied although precise 'knowledge' was.

Other testimony by Barile and Carroll attributed specific antiunion remarks and threats to various principals of the Company; the ALJ specifically chose to discredit their testimony on these matters. He stated that "their demeanor was negative and their recitation of the events seems more self-serving than accurate" and that he believed that "much of their testimony was an attempt to support a [conclusion of illegal discharge] and whether intentionally contrived or not, their testimony is not, I believe, reliable."

the Board's opinion is the finding that the Company did not sufficiently "justify" its selection for discharge; this finding is the one on which the *Wright Line* imposition of the burdens of proof bears directly.

Despite the Board's labeling the Company's asserted justification as a "makeweight argument," we believe that there was sufficient record evidence supporting that justification as genuine to merit a reconsideration of the issue under the proper *Wright Line* standard. The Company's claim that its decision was based upon DeLuca's desire to retain his friend Nasuti within the Heartland organization is not on its face incredible, nor are the Board's reasons for rejecting this explanation so clearly substantiated on the record as to make further proceedings unnecessary.

The Company urges us to reverse the Board's decision in all respects and set aside the order of the Board. This we are reluctant to do. Were the Board, upon reconsideration under the proper standard, to persist in its opinion that the Company's asserted justification was contrived, we would take into account the fact that effort to create a false justification is evidence of an illegitimate motive. *Shattuck Denn Mining Corp. (Iron King Branch)* v. *NLRB*, *supra*. Courts must look to the "whole" record to find "substantial evidence" under the Administrative Procedure Act, and we have recently held that the Board *must* consider the employer's exculpatory evidence before judging whether a violation exists. *NLRB* v. *Wright Line*, 662 F.2d at 907. It would be anomalous to forbid the Board to find incriminating evidence in the midst of the employer's justification. We also note that in its opinion, the Board placed no reliance either upon the ALJ's application of the small-plant doctrine or his finding that the Company learned of union activities of Barile and Carroll from a nonsupervisory employee who was "sufficiently identified" with management. *See* note 3 *supra*. Had the

Board conducted the close analysis required under our *Wright Line* opinion, it might have considered these findings more fully.

We therefore vacate the decision of the Board and remand the case for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1592

HEARTLAND FOOD WAREHOUSE,
A DIVISION OF PURITY SUPREME SUPERMARKETS,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

DECREE

Entered June 1, 1982

This cause came on to be heard upon petition for review of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board is vacated and the cause is remanded for further proceedings in accordance with the opinion filed this day.

Each side is to bear its own costs.

By the Court:
/s/ DANA H. GALLUP
Clerk.

A True Copy
Attest:

/s/ Dana H. Gallup
Clerk

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 39—CA—9

HEARTLAND FOOD WAREHOUSE, DIVISION OF PURITY SUPREME SUPERMARKETS

and

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 371, AFL—CIO

DECISION AND ORDER

On October 9, 1980, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, both Respondent and the General Counsel filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and

[1] Respondent has requested oral argument. The request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions wth respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

conclusions of the Administrative Law Judge, as modified and further explained herein, and to adopt his recommended Order, as modified herein.[3]

The central issue presented by this proceeding is whether Respondent discharged its employees Kerry Carroll and John Barile because of their participation in protected concerted activities, and thereby in violation of Section 8(a)(1) and (3) of the Act. In adopting the Administrative Law Judge's conclusion that Respondent discriminatorily discharged these employees, we rely upon the following analysis which applies the test enunciated in the Board's recent decision in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980). The test in cases alleging violation of Section 8(a)(3) of the Act, where a lawful as well as an unlawful motive may exist for the discharge, requires the General Counsel to make a *prima facie* showing that the employees' protected activities motivated Respondent's decision to discharge them. If the General Counsel is successful, the burden of proof is then shifted to Respondent to show by a preponderance of the evidence that the discharges would have occurred even in the absence of the employees' protected activities.

With respect to the first part of that test, it is clear that the General Counsel has successfully met his burden of establishing a *prima facie* case of unlawful discrimination. The evidence establishes that employees Carroll and Barile were leading union adherents. They also were vocal critics of Respondent's management policies, and this latter fact was all too well known to Respondent. Thus, it was Carroll and Barile who requested a meeting between the store manager and the meat department employees to discuss employee grievances, and, when such a meeting was held on

[3] We shall modify the recommended Order and notice to include the full reinstatement language traditionally used by the Board.

September 15, 1979, Carroll and Barile were the most outspoken protagonists in attendance. This meeting prompted still another meeting on October 4, 1979, between Leo Brown, Respondent's vice president for industrial relations, and the employees of the meat department. At the second meeting, Brown repeatedly emphasized that the employees did not need a "third party" to speak for them, and, although Brown did not at any time mention the word "union," he admitted in his testimony that by third party he meant a union.

The foregoing evidence establishes that Respondent was both aware of and concerned about employee discontent; that it recognized the distinct possibility that the employees would attempt to bring a union into the store if they had not, in fact, done so already; and that Respondent, through Brown, openly and specifically opposed such concerted activity, though avoiding the use of the term "union" in so doing. While there is no evidence that Respondent had specific knowledge of the union activities of Carroll or Barile,[4] or for that matter that union activities were actually underway, it clearly recognized the potential for such action, and, in view of the concerted activities of both Carroll and Barile, Respondent could readily assume that they would be in the forefront of any such effort. Accordingly, we find that Respondent's knowledge of the protected activities of Carroll and Barile as leaders in the presentation of employee grievances, and its fear that their activities might culminate in a union drive, were factors in their selection for discharge. We therefore conclude that the

[4] We do not rely on the Administrative Law Judge's application of the small-plant doctrine to show that Respondent had knowledge of the union activities of Carroll and Barile. We also place no reliance on the Administrative Law Judge's finding that Respondent learned of the union activities of Carroll and Barile from a nonsupervisory employee who was "sufficiently identified with" management.

General Counsel has met his burden of proof under *Wright Line*.

We turn now to the reasons offered by Respondent to rebut the General Counsel's case. Respondent seeks to demonstrate that Carroll and Barile were laid off for purely economic reasons. Respondent maintains that economic reasons forced it to reduce by two the number of meatcutters at its Vernon store. According to Respondent, Carroll and Barile were selected for discharge based upon ratings of their performance and productivity, which placed them last among the five Vernon meatcutters, and without consideration of their expression of grievances or their potential for union activity.

We reject Respondent's explanation for selecting Carroll and Barile for discharge as incompatible with its actions both prior to and following their termination. We note that while Respondent claims that economic reasons forced it to lay off two meatcutters at its Vernon store, Respondent immediately transferred a less experienced meatcutter from its nearby Newington store to replace one of the meatcutters discharged from Vernon. As the Administrative Law Judge found, Respondent's assertion that it transferred the less experienced meatcutter because of its policy prohibiting family members from working in the same store is plainly a makeweight argument, since Respondent had often made exceptions to this policy. We note also that while Respondent contends that it had economic problems in both its Vernon and Newington stores it made no attempt to rate the meatcutters in Newington. At all times, Respondent's focus was on its Vernon store, where concern over employee unrest, concerted activity, and potential union support had led to a series of meetings between employees and management officials, and where Carroll and Barile, were outspoken in their voicing of employee grievances.

Although Respondent asserts, and the Administrative Law Judge found, that it had economic justification for reducing the number of meatcutters at its Vernon store, Respondent has not shown that, absent Carroll and Barile's participation in protected activities, these employees would have been the ones discharged, rather than any of the other Vernon meatcutters or the less experienced meatcutter transferred from Newington. We rely here again on the transfer to Vernon of a less experienced meatcutter. Further undermining Respondent's defense is the fact that Respondent had previously pursued a policy of offering full-time employees transfers to other stores as an alternative to layoff. Respondent did not follow this policy with regard to Carroll and Barile, who were not offered transfers to any of Respondent's other stores. See *Montgomery Ward & Co., Incorporated*, 234 NLRB 13 (1978). The Administrative Law Judge was therefore correct in finding that where, as here, the respondent's stated motives for discharge are discredited, it may be inferred that the true motive for discharge is an unlawful one which respondent seeks to disguise. See *Shattuck Denn Mining Corporation (Iron King Branch)* v. *NL.L.R.B.*, 362 F.2d 466 (9th Cir. 1966); *First National Bank of Pueblo*, 240 NLRB 184 (1979). We therefore conclude that Respondent discharged Carroll and Barile because of their protected concerted activities and affirm the Administrative Law Judge's finding that Respondent thus violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Heartland Food

Warehouse, Division of Purity Supreme Supermarkets, Vernon, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer John Barile and Kerry Carroll immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them in accordance with the provisions in the section of this Decision entitled "The Remedy."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. June 29, 1981

_____

John H. Fanning, Chairman

_____

Howard Jenkins, Jr., Member

_____

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT lay off or otherwise discriminate against our employees because they engage in concerted activity protected by Section 7 of the National Labor Relations Act or engage in any activity on behalf of any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer John Barile and Kerry Carroll immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

HEARTLAND FOOD WAREHOUSE,
DIVISION OF PURITY
SUPREME SUPERMARKETS

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 750 Main Street, Room 1200, Hartford, Connecticut 06103, Telephone 203—244—3002.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 39-CA-9

HEARTLAND FOODS WAREHOUSE, DIVISION OF PURITY SUPREME SUPERMARKETS

and

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 371, AFL-CIO

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me on May 27 and 28, 1980, at Hartford, Connecticut, upon the General Counsel's complaint which alleged that on November 3, 1979,[1] the Respondent terminated 2 employees in violation of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act as amended, 29 U.S.C. § 151 *et seq.* It is also alleged that the Respondent engaged in certain activity violative of Section 8(a)(1) of the Act.

The Respondent admitted laying off the 2 employees on the date alleged but contends that such was prompted by economic concerns and not unlawfully

[1] All dates are in 1979 unless otherwise indicated.

motivated. The Respondent generally denied that it otherwise engaged in any activity violative of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Jurisdiction

The Respondent is a Massachusetts corporation engaged in the operation of retail grocery stores in several New England states, including facilities at Vernon and Newington, Connecticut. In the course and conduct of its business, the Respondent annually derives gross revenues in excess of $500,000 and annually receives at its Vernon facility goods, products and materials valued in excess of $50,000 directly from points outside the State of Connecticut. The Respondent admits and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. The Labor Organization Involved

United Food & Commercial Workers Union, Local 371, AFL-CIO, (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Facts as Found*

The Respondent opened its Vernon store (a low overhead type supermarket) in October 1978. At that time Kerry Carroll and John Barile were hired as meatcutters, neither having been previously employed by the Respondent. However, both were experienced meatcutters. Some of the Vernon staff transferred

from the Respondent's Newington store including the store manager, Warren Boyle and the meat department manager, Russell Dussault.

For 2 days after its opening, the Union picketed the store. There was then no activity on behalf of the Union until some employees, particularly Carroll and Barile, began discussing it among themselves in August or September 1979. Following an initial meeting of just employees (Barile, Carroll and one other), the business agent for the Union was contacted and in late September, Barile and Carroll met with him and signed authorization cards. They testified that they took authorization cards back to the store and attempted to get other employees to sign them, but were unsuccessful even though some of the others had indicated a willingness to do so. Aside from some general discussion concerning the Union or unionization to which Barile and Carroll testified, such was the extent of union activity in this matter.

In mid-September, at the request first of Barile and then Carroll, Boyle agreed to meet with the meat department employees in order to hear and air some grievances they said they had. The meeting was held on September 15.[2] At this meeting, Barile and Carroll

[2] Both Barile and Carroll placed the time of this meeting in mid-October; however, I am satisfied that the meeting took place on or about September 15. I found Boyle's testimony to be more credible than that of either Barile and Carroll. Further, Boyle's dating of the meeting is consistent with the company payroll records concerning the vacations of Dussault and Boyle. Finally, where credibility resolutions are required in this matter, I am constrained not to credit Barile and Carroll. Generally their demeanor was negative and their recitation of the events seemed more self-serving than accurate. I note also that on the material issues where their testimony differed from other witnesses their's was not corroborated whereas the testimony of witnesses called by the Respondent was, in some instances by individuals who appear to have little stake in the outcome of this proceeding. Barile and Carroll, of

voiced a number of objections to the way Boyle was running the meat department including a grievance concerning over-time, a supposed undercutting of Carroll with a customer, and generally that Boyle had ceased being a good guy in a "white hat". There is no question, even from the Respondent's witnesses, that Barile and Carroll were the outspoken protagonists at this meeting.

Both before and after the meeting, Boyle reported this matter to the District Manager, Edward (Ned) DeLuca, who in turn asked Leo Brown, the Respondent's vice-president of industrial relations, to meet with employees at the Vernon store. Brown arranged to meet with them on October 4.

Brown testified that the meat departments of 14 of the Respondent's 40 stores are unionized, down one from when he took charge of industrial relations a number of years ago. He also testified that when the meatcutters (now the Union, after its merger with the retail clerks) begin an organizational campaign, he "runs like a scared rabbit."

During the course of his meeting with employees, Brown extolled the Company, its benefits, and told employees among other things that they did not need a "third party" to speak for them—that the Company was one big happy family. Brown credibly testified that at no time during the course of this meeting did he say "union", tell employees that he had heard they were attempting to organize a union and that he wanted it stopped, or make any of the other anti-union statements attributed to him by Barile and Carroll. Brown's

---

course, are principals and are the only ones who stand to gain from a favorable resolution of the issues here. Thus, while I do conclude, *infra*, that Barile and Carroll were laid off in violation of the Act, I believe that much of their testimony was an attempt to support such a conclusion and whether intentionally contrived or not, their testimony is not, I believe, reliable.

testimony is corroborated by all of the other witnesses who testified concerning this event except Barile and Carroll.

Barile and Carroll both testified that Brown opened the meeting by stating that he had heard there was a union talk going around among employees, and that he wanted it stopped. I find this testimony of Barile and Carroll is not credible, is self-serving, and I specifically conclude that Brown did not make the statements attributed to him by Barile and Carroll. Further, I find that during the course of his discussion with employees, Brown did not mention the word "union" at all.

This is not to say, however, that Brown was not interested in attempting to stop what he may have conceived as an embryonic union campaign when he agreed to meet with employees. The meeting with employees resulted from the apparently adverse meeting Boyle had with the meat department some 2 weeks previously. Brown testified that when he told employees they did not need a "third party" he meant that they did not need a union. While Brown, did not use the word "union", he did not have to. The employees knew full-well what he meant.

From its opening, the Vernon store did not do as well as the Respondent had anticipated. Much of its overhead is payroll and the Company closely monitors the payroll against gross sales. The Company's adverse payroll/gross volume situation resulted in a management decision to lay-off all of the part-time employees in the meat department of the Vernon store in the Spring of 1979. Nevertheless, according to the Respondent's generally credible evidence, the situation did not substantially improve. Thus, DeLuca wrote a memorandum to his superior on August 8 wherein he stated that the Company was "heavy 2 cutters" at the Vernon store and that even if business increased significantly in

the Fall they would still be over-staffed. He recommmended they wait another month or so to determine whether to lay off anyone.

Then on September 6, DeLuca wrote another memorandum in which he stated that both the Vernon and Newington stores had shown a slight improvement but that the meat departments continued to be areas of concern; and in any event, both Newington and Vernon would probably be over staffed by 2.

Finally, on October 29, DeLuca wrote a third memorandum to his superior recommending that 2 meatcutters be laid off in the Vernon store and one be transferred from Newington which would have the net result of reducing the meat department payroll in each store by 40 hours per week.

On November 3, Carroll and Barile were informed by Boyle that they were being laid off, Boyle telling them that there was little prospect for an improvement in the Company's situation and thus the chances of recall were minimal. Barile and Carroll testified that Boyle told them that one of the criteria used by him in determining to lay them off was their "attitude." Boyle denied this, a denial which I credit. Boyle did testify, however, that both Barile and Carroll were good meatcutters but that he had determined to lay them off rather than any of the other 3 in the department because it was his determination, as well as that of others who rated all of the meatcutters, that Barile and Carroll were respectively 4th and 5th (or vice versa) among the 5.

With the lay-off of Barile and Carroll, Carlo Nasuti was transferred from the Newington store to Vernon. The Company contends the reason it transferred Nasuti was because he had recently married another employee at the Newington store. Company policy prohibits 2 members of an immediate family working at the same store. The Company did not adequately explain however, why it chose to lay off a competent meatcut-

ter—either Carroll or Barile—and keep Nasuti who was still very much in process of learning. He had been classified as a meatcutter only in August 1979 after having passed a test he had flunked previously.

B. *Analysis and Concluding Findings*

1. The lay-offs of Barile and Carroll

An employer may layoff whomever it wishes and whenever. Such is not unlawful under this Act unless motivated by employee's union activity or to discriminate against employees because they engaged in concerted activity protected by Section 7. Nor is it an unfair labor practice for an employer to be irrational or inconsistent in the application of its employment policies. However, where, as here, it is alleged that the employer laid off employees with an unlawful motive, then all of the surrounding circumstances are an appropriate area of inquiry. Irrational and inconsistent acts of the employer give rise to the legitimate inference that the motive is other than that which the employer professes. That is, experience has taught that companies do not in fact conduct their personnel relations in an irrational fashion. In short, the Respondent's self-serving denials need not be accepted at face value. Indeed if all the surrounding circumstances so suggest, they can be discredited from which an inference can be drawn that the true motive for selecting a given individual for lay-off was that which the employer sought to disguise, namely an unlawful one. *Shauttuck Denn Mining Corp.*, 362 F.2d 685 (9th Cir., 1966).

Such, I conclude, is the situation here. I conclude that notwithstanding the Respondent's demonstrated economic necessity for laying off 1 meatcutter at the Vernon store, it determined to lay off 2 because Barile and Carroll had engaged in protected concerted activity at a minimum, and potentially were involved in an organizational campaign on behalf of the Union.

The Respondent attempted to prove that Barile and Carroll were selected only after it was determined that 2 employees from the Vernon store would have to be laid-off and that the selection process was so fair as to negate any inference of an unlawful motive. Thus, in the week or so prior to the lay-offs, a number of individuals rated the 5 full-time meatcutters at the Vernon store, rating Barile and Carroll 4th and 5th. However, this asserted fairness is inconsistent with what in fact happened—the lay-off of both Barile and Carroll and the transfer to the Vernon store of Carlo Nasuti who was neither as experienced nor as competent a meatcutter as either Barile and Carroll.

While the Respondent's witnesses testified concerning the policy that members of an immediate family are not allowed to work at the same store, the Respondent does allow exceptions. Beyond this, the policy does not explain why the Respondent would retain an employee of lesser competence and experience. It is further noted that the Respondent apparently determined to reduce the payroll at both the Newington and the Vernon stores as per DeLuca's memos, but did not rate any of the employees at the Newington store, either among themselves or together with the Vernon meatcutters. The only conceivable explanation for treating the Vernon employees differently from those at Newington is that the Respondent was attempting to make a record to justify its ultimate selection. In short, a fair inference from the inconsistent manner with which the Respondent treated the Newington and Vernon employees is, and I conclude, that the Respondent had predetermined the lay off precisely Barile and Carroll and sought to disguise its motive for doing so.

Both DeLuca and Brown testified that it is the Company's policy not to lay off permanent full-time employees. Indeed, the parties stipulated that in all the Respondent's stores, the only layoffs of full-time

meatcutters between January 1, 1978, and November 3, 1979, were Barile and Carroll. Thus, where a reduction-in-force is required at a particular store, the employee selected is given an opportunity to transfer to another store. Neither Barile nor Carroll were given such an opportunity and thus were treated disparately from other employees of the Respondent and in opposition to Respondent's stated policy and practice. This departure was not explained. But a reasonable inference is that the Respondent decided to sever the employment of Barile and Carroll.

In view of the inconsistency with which the Respondent treated Barile and Carroll as against Nasuti as well as employees generally, I conclude that the Respondent's stated motive in selecting them for lay-off was not solely economic necessity.

Indeed, I conclude that Barile and Carroll were selected for layoff because they had engaged in protected concerted activity in seeking and speaking at the September meeting with Boyle, and to the extent the Respondent knew of the fleging union campaign, Barile and Carroll were clearly the ones who figured to be the 2 activists. It does not require specific knowledge of their union activity on the part of DeLuca and Boyle to conclude that the reason these 2 were selected was because of their potential for engaging in union activity and because they had in fact engaged in protected concerted activity.

Though knowledge of the union activity is specifically denied by all of the principles of the Respondent, I do note that Dussault, the meat department head, must necessarily have been aware of it. Though he testified he did not confirm or deny such knowledge. Given the nature of the operation and the small number of employees, I conclude that Dussault had specific knowledge of the union activity. Even though it appears from the record that his duties do not make him a supervisor

within the meaning of Section 2(11) of the Act, he is sufficiently identified with management of the Respondent's Vernon store so as to conclude that his knowledge became at least the supposition of higher management. This was not denied though precise "knowledge" was.

Further, the timing of the lay-offs of Barile and Carroll in connection with the union activity as well as their meeting with Boyle would suggest that these factors played a predominant role in the Respondent's decision.

While I find from the record before me that the Respondent did have economic justification for laying off 1 meatcutter at the Vernon store, it chose to lay-off the 2 for unlawful reasons. Thus, this is not a case where absent the union activity, the same result would have attained. Rather, in this matter, but for the concerted activity of Barile and Carroll, one of them at least, if not both, would not have been selected for lay-off. And even if I can conclude that one of them would have been selected for lay-off, from the state of this record it is unknown which. I conclude that Barile and Carroll principally were laid off in violation of Section 8(a)(1) because they had engaged in concerted activity protected by Section 7 of the Act. In addition, I conclude that they were suspected, at least, of beginning the organizational campaign and that such was a factor in the determination to lay them off. Accordingly, the lay-offs were also violative of Section 8(a)(3) of the Act.

2. The alleged 8(a)(1) violations

The General Counsel alleges that during the October 4 meeting which Brown held among employees, he created the impression of surveillance, impliedly threatened employees, informed them that it would be futile for them to select the Union as their bargaining

representative, and promulgated a rule prohibiting all union activity. From the generally credible testimony of Brown, corroborated to a substantial extent by other vitnesses, I conclude that he made none of the statements attributed to him by Barile and Carroll on which finding such violations could be made. Specifically, I find that Brown did not at any time mention the word "union" to employees. While the purpose of his meeting no doubt was to inform employees that the Company could get along very well without a third party (meaning union) and that his meeting with employees was no doubt troubleshooting in nature, nevertheless such is permissible absent threats or the like.

As noted above, I specifically do not credit the testimony of Barile and Carroll concerning the substance of this meeting, and accordingly I will recommend that paragraph 8 of the Complaint be dismissed.

It is further alleged that in October, DeLuca solicited employee complaints and grievances and promised increased benefits. Both Barile and Carroll testified that DeLuca talked to employees individually following the meeting with Boyle. They testified he asked if they had any complaints or problems because he had heard there had been some.

While these individual discussions with employees were undenied by DeLuca, I find nothing in them violative of the Act. Not even Barile or Carroll testified that DeLuca made any statements to them indicating that his discussions were any more than those permitted by management with employees when problems come to a managers attention. There was no mention of the Union, or the organizational campaign, nor did Barile or Carroll testify that DeLuca promised to solve grievances or promised benefits. In short, I conclude that a manager has the right to discuss problems that have come to his attention with employees and that absent

some factor which would make these conversations intimidating or otherwise interfere with employees' Section 7 rights, I conclude that such is not unlawful. Accordingly, I will recommend that paragraph 9 of the Complaint be dismissed.

IV. The Effects of the Unfair Labor Practices on Commerce

The unfair labor practices found, occurring in connection with the Respondent's business, have a close intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Sections 2(6) and 2(7) of the Act.

V. The Remedy

Having found that the Respondent unlawfully laid off John Barile and Kerry Carroll on November 3, 1979, I shall recommend that it cease and desist from such activity and offer them reinstatement to their former jobs, or if those jobs no longer exist to substantially equivalent positions of employment and make them whole for any wages or other benefits they may have lost as a result of the discrimination against them in accordance with the formula set forth in *F.W. Woolworth Co.*, 90 NLRB 298 (1950), with interest as provided for in *Florida Steel corp.*, 231 NLRB 651 (1977).[3]

[3] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:[4]

ORDER

The Respondent, Heartland Food Warehouse, a Division of Purity Supreme Supermarkets, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Laying off or otherwise discriminating against employees because they engage in concerted activities protected by Section 7 of the Act or activity on behalf of the Union or any other labor organization.

(b) In any like or related manner interferring with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[5]

2. Take the following affirmative action:

(a) Offer reinstatement to John Barile and Kerry Carroll to their former jobs, or if those jobs no longer exist to substantially equivalent positions of employment and make them whole for any losses they may have suffered as a result of the discrimination against them in accordance with the provisions of the Remedy section above.

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[4] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 192.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

[5] Although finding that the Respondent did in fact discriminate against 2 employees in violation of the Act, generally it does not appear from this record that the Respondent has a proclivity to engage in unfair labor practices. Accordingly, the narrow injunctive order is appropriate *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979).

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Vernon, Connecticut, facility, copies of the notice marked, "Appendix."[6] Copies of the notice, on forms provided by the Officer-In-Charge for Sub-Region 39, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Officer-In-Charge for Sub-Region 39, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

(e) The complaint in all respects not found herein is dismissed.

Dated, Washington, D.C. October 9, 1980

/s/

JAMES L. ROSE
Administrative Law Judge

[6] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES WERE ALLOWED TO PARTICIPATE, CALL, EXAMINE AND CROSS EXAMINE WITNESSES, IT HAS BEEN FOUND BY THE NATIONAL LABOR RELATIONS BOARD THAT WE HAVE COMMITTED CERTAIN UNFAIR LABOR PRACTICES. WE HAVE BEEN ORDERED TO CEASE SUCH ACTIVITY, TO POST THIS NOTICE, AND TO COMPLY WITH ITS TERMS.

WE WILL NOT lay off or otherwise discriminate against our employees because they engaged in concerted activity protected by Section 7 of the National Labor Relations Act or engage in any activity on behalf of any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the Act.

WE WILL offer John Barile and Kerry Carroll reinstatement to their former jobs, or if those jobs no longer exist to substantially equivalent positions of employment and WE WILL make them whole for any losses they may have suffered, as a result of the discrimination against them, with interest.

HEARTLAND FOODS WAREHOUSE
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Office-Supreme Court, U.S.
FILED
JAN 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-736

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

HEARTLAND FOOD WAREHOUSE, A DIVISION OF PURITY SUPREME SUPERMARKETS,
RESPONDENT.

RESPONDENT'S MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-736

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

HEARTLAND FOOD WAREHOUSE, A DIVISION OF PURITY SUPREME SUPERMARKETS,
RESPONDENT.

RESPONDENT'S MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Statement of the Case

On October 28, 1982, the Petitioner, the National Labor Relations Board, through the Solicitor General, filed its petition for a writ of certiorari in the instant case,[1] in which, after it set out its reasons for this Court's granting the petition

[1] The opinion of the Court of Appeals below, rendered June 1, 1982, is reported at 685 F.2d 421.

(p. 7),[2] it concluded by urging that "The petition for a writ of certiorari should be held and disposed of in light of the disposition of *NLRB* v. *Transportation Management Corp.* No. 82-168." At the time, the Government had filed its petition in *Transportation Management*, but this Court had not yet acted upon it. As Petitioner in the instant case it urged (p. 7) that the same issue was raised in *Transportation Management* as here.[3]

Thereafter, on November 15, 1982, this Court granted the petition for certiorari in *Transporation Management*.[4] In light of that, the Court has directed the filing of a response by the Respondent herein.

Statement of Position

The Respondent does not oppose the disposition of the instant petition as urged by the Petitioner in the Conclusion of its petition, *supra*. More precisely, the Respondent does not object to the Court's holding the instant petition and disposing of it in light of such decision as may be forthcoming in *Transportation Management*, simply in recognition of the Court's discretion to hold petitions generally until a decision is reached in a pending case raising either identical or related issues.[5]

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[2] As used herein, page numbers within parentheses are to the aforementioned petition for writ of certiorari.

[3] The Petitioner correctly states that the broad legal issue is the same to the extent that it involves decisions of the First Circuit dealing with burdens of proof under its test in *NLRB* v. *Wright Line, A Division of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). However, the fact situation in *Transportation Management* is so different from that here that the decision of the Court in that case may not necessarily prove dispositive here.

[4] 51 USLW 3378.

[5] R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978), p. 360.

However, the Respondent reserves the right to file a further response after the Court has rendered its decision in *Transportation Management*, the substance of which would be known only after, and in light of, such decision, but which could include a counterstatement of the case and argument with respect to distinguishing any such decision and questioning its application to the instant case.

Respectfully submitted,

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